

**STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS**

IN THE MATTER OF THE UNIT DETERMINATION CHARGE NO. 9-2011

MONTANA PUBLIC EMPLOYEES
ASSOCIATION,

Complainant,

- vs -

STATE OF MONTANA, MONTANA DEPT OF
TRANSPORTATION,

Respondent.

ORDER

INTRODUCTION

This matter came before the Board of Personnel Appeals (Board) on June 16, 2011. Respondent, State of Montana, Montana Department of Transportation (MDT), appeared and was represented by, Department of Administration attorney, Marjorie L. Thomas. Petitioner, Montana Public Employees Association (MPEA), appeared and was represented by Carter Picotte. The Board reviewed the complete record and the parties presented oral argument.

FACTUAL AND PROCEDURAL BACKGROUND

On September 7, 2010, MPEA filed an unfair labor practice (ULP) charge against MDT asserting that an MDT supervisor had retaliated against MPEA members that had exercised their rights under a supplemental agreement between MPEA and MDT. The specifics of the ULP involved an email sent September 2, 2011, at 9:26 a.m., by William Fogarty, an MDT Construction Supervisor. This email indicated that staff that had declined to work an alternate work week schedule during the construction season would "not be approved to work alternate work week schedules post construction season." Later, that same day, at 5:01 p.m., William Fogarty's supervisor, Jeff Ebert, sent an email rescinding the first email.

On February 25, 2011, MDT filed a Motion for Summary Judgment arguing that the MPEA complaint was moot, there was no dispute of material fact and that MDT was entitled to summary judgment as a matter of law, and that there was no legal basis to support the determination that an ULP had occurred. Following briefing, the Hearing Officer dismissed the ULP on the grounds that MDT's actions "mooted" the ULP and that MDT was entitled to judgment as a matter of law.

In briefing and at oral argument, MPEA asserted that the Board's procedures do not allow for summary judgment. And, even if the Board allowed summary judgment, the Hearing Officer erred when he applied inapplicable standards to grant the motion. MPEA contends that MDT had submitted affidavits from management. In response, MPEA submitted a letter of resignation from management rebutting the evidence offered by MDT. Considering this evidence, the Hearing Officer unduly dismissed this letter on the grounds that the letter was not a verified. The Hearing Officer erred in this because the Rules of Evidence do not apply. Furthermore, the Hearing Officer erred when he failed to resolve all doubts in favor of the complaining party. MPEA contends a clear conflict of material fact exists which can only be resolved with a contested case proceeding.

In response, MDT in briefing and at oral argument argued that whether summary judgment is allowed in Board proceedings is not necessarily controlling. The fact remains that this ULP was also dismissed because the matter was moot and MPEA does not appear to contest this. As for the validity of the summary judgment motion, MDT notes that although the specific rule governing summary judgment motions was recently repealed, nothing in the statements of reasonable necessity regarding the rules notice indicate that such motions would no longer be entertained. Further, MDT asserted that the letter provided by MPEA was insufficient grounds to raise a material fact. Whereas there may have been "intent" to take an adverse act, this intent was never manifested, and that the law requires an adverse employment action.

After careful and due consideration of the arguments and a review of the complete record, the Board rejected the Hearing Officer's Recommended Order.

The Board determined that the Hearing Officer's determination that there was no unfair labor practice was premature. As noted in the Hearing Officer's decision, William Fogarty's email is the only factual basis in the record supporting MPEA's complaint. However, on its face, William Fogarty's email raises the specter of retaliation. Of course, this email was rescinded shortly after it was sent. But, without a contested proceeding to initially establish whether there was an unfair labor practice, a determination that the matter is "moot" is premature. The parties should be allowed to present evidence on the unfair labor practice charge. Once this determination is made, then the Hearing Officer can move forward and consider arguments that the issue is moot. But, again, such

argument must inherently be considered after a determination of whether there has been an unfair labor practice.

CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction of this matter pursuant to Mont. Code Ann. § 39-31-207.
2. This matter is remanded to the Hearings Bureau for a contested case proceeding on the Unfair Labor Practice No. 9-2011.

DATED this 30th day of June, 2011.

BOARD OF PERSONNEL APPEALS

By: Jack A. Holstrom
Jack Holstrom, Presiding Officer

Board members Jay Reardon and Jerry Rukavina concur.

NOTICE: You may be entitled to Judicial Review of this Order. Judicial Review may be obtained by filing a petition for Judicial Review with the District Court no later than thirty (30) days from the service of this Order. Judicial Review is pursuant to the provisions of Section 2-4-701, et seq., MCA.

CERTIFICATE OF MAILING

I, Windy Kruton, do hereby certify that a true and correct copy of this document was mailed to the following on the 1st day of July 2011: